IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

- - - - - - - - - - - - - - - - -X
UNITED STATES OF AMERICA, :
:
Plaintiff, : Criminal No. 4:13-147
:
vs. :
:
MO HAILONG AND MO YUN, : TRANSCRIPT OF HEARING
:
Defendants. :
- - - - - - - - - - - - - - - - -X

Second Floor Courtroom
United States Courthouse
123 East Walnut Street
Des Moines, Iowa 50309
Wednesday, October 1, 2014
10:00 a.m.

BEFORE: THE HONORABLE ROBERT W. PRATT, Senior Judge.

Terri L. Martin, CSR, RPR, CRR
United States Court Reporter
Room 189, U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa 50309

APPEARANCES:

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TERRY W. BIRD, ESQ.
GARY S. LINCENBERG, ESQ.
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ALSO PRESENT: Chau Lau, Interpreter

P R O C E E D I N G S

(In chambers, with counsel, no defendants.)

THE COURT: We're in chambers with counsel for both defendants; Mr. Weinhardt and Ms. Logan, and the government, and Mr. Bird is here along with his associates for Mo Yun.

So the lawyers indicated they wanted to talk in chambers about something. So, Mr. Griess, do you want to make a record?

MR. GRIESS: I do, Your Honor. It was my request. And, unfortunately, I'm in the uncomfortable position today of asking the court for a continuance, and let me explain it as succinctly as I can. As I think everyone is aware, this is a very unique and complex case in ways that are not necessarily limited, that are not limited to just discovery.

Over the last several weeks since the filing of the motions, we have been in daily, constant communication with the Department of Justice about the various issues that are involved. Since the indictments in this case, in December for Mr. Hailong and July for Ms. Yun, we have disclosed thousands of pages of discovery as has been documented by the defense in their motions. During conference last week when we were talking about a number of issues, I alerted the defense to the fact that we were dealing with some issues that may require me to ask the court for a continuance but that I did not know at that point in time where we would be with regard to that.

As of this morning, I have been directed by the Department of Justice that I cannot address the merits of these motions this morning, either legally or ethically, and so, reluctantly, we're asking the court to continue the hearings on these motions so that we can be in a position to do that. We believe a minimum of ten days would give us and the Department of Justice sufficient time to put us in that position.

THE COURT: Why has it been this late? I mean, Mr. Bird and his associates have spent a lot of money coming here. I wasn't going to give a hearing on these motions until Mr. Bird pressed my law clerk, and I was out of town, and he stressed at the time, and I don't think this was -- I know this was not ex parte. Mr. Bird, you tell me, I think you told my office that it was nuanced type of argument that you thought submission orally could add to the court's understanding of the issues.

MR. BIRD: Precisely, Your Honor. I think the main point we made -- and, by the way, it was not ex parte. It was with Mr. Griess on the phone.

THE COURT: Right.

MR. BIRD: -- was we believed that the court's resolution of the motions would necessarily bring scheduling issues into effect and we wanted to address the nuances of those scheduling issues, when things would be ordered, produced, when motions would be filed, et cetera, live with you as opposed to --

THE COURT: Right. And so, Mr. Griess, why are we here now on the morning of hearing as opposed to ten days ago or a week ago before counsel incurred the expense?

MR. GRIESS: Your Honor, I totally understand that, and in part because I know how significant it is to have decisions on these motions as soon as possible, I know how much they want that and how much they need that, everybody does; but it's precisely the reasons that we can't talk about it today that I can't inform the court exactly what the reasons are. There are both legal and ethical reasons that I can't get into that and that we can't address the motions today.

And so the court doesn't think that we have been sitting on these issues and doing nothing, I can only represent to the court that that is absolutely not the case, that from the moment that these motions were filed we've been in constant, daily communication with the DOJ, and they've been aware of the issues and were attempting to resolve the issues, and we're not in that position here today.

THE COURT: Okay. Early on I shared with Mr. Weinhardt when the first defendant appeared, I got a letter out of the blue from somebody at the FJC telling me about this was a, quote, national security case. So I sent it to Mr. Weinhardt, and I'm sure he shared it with counsel. I mean, is this what you're talking about, this is somehow you can't reveal the reason that you need a continuance, is it related to FISA? I mean, I need a little bit more, and I'm not -- you know, I think your office always operates, you know, in an ethical manner. So what's the reason you can't tell me?

MR. GRIESS: I can't tell you. Your Honor, I hate -- I realize that this isn't going to -- believe me, I fully understand the position this puts the court in in cancelling, but that's exactly what I can't address.

THE COURT: Okay. Mr. Bird, do you need to make some record here?

MR. BIRD: I do, Your Honor. I'm struggling with where to start. As Mr. Griess says, the case was indicted in December of last year against Hailong Mo. We were indicted -- our client was indicted July 2nd. The case -- as far as we can tell, the investigation of the case ended sometime in 2012. This is not a recent matter. The government has known for -- knew for over a year, maybe two years that they were investigating, went to a lot of expense and trouble to surveil, to wiretap, to do all sorts of things, to investigate activities in 2011 and 2012. So this isn't a recent case that just got indicted.

Then they scurry in what I would call sort of a shoot and then ask questions version or method. They scurry to indict our client when she's at the airport, at LAX in Los Angeles on the way back to China in a very hurried way on the basis of six overt acts, all of which are questionable in terms of their construction of them.

That said, we filed these motions several weeks ago. We gave a continuance to Mr. Griess. There's nothing in their papers that say anything about this. We learned for the first time very vaguely, and we probed on the phone when we had a discovery conversation with Mr. Griess last Thursday as to what he was talking about, true --

THE COURT: Let me interrupt, and I apologize for that. So last Thursday did he say, well, there's some complication here with respect to discovery that is going to make our hearing next Wednesday inappropriate, or what was the discussion?

MR. BIRD: No. As a matter of fact, what he said was, he said, I hope to have discovery for you by the time of the hearing next Thursday. And he said at that time, I would be willing to give a day or two continuance. And we said, can you tell us what you're talking about? He said, no. We said, look, we can't hold off on this, we need to get going, because, Your Honor, we're asking for a December 1st trial date.

Every time the government comes in and doesn't provide us discovery, doesn't -- continues a hearing like this, they are, in effect, securing the result they want, and now they won't even explain to us why. They didn't explain it to us last Thursday. They knew we were coming out. I e-mailed Mr. Griess yesterday and said, I'm here, please send over the discovery so that we can review it before the hearing. There was no response, and then we show up this morning.

I mean, Your Honor is exactly right, we've gone to a lot of effort and expense to come here and they could have told us this weeks ago. They didn't have to wait until now to do it. The government is the one that indicted this case. They should be ready to take it to trial. And with all due respect, Your Honor, we think this court should have control of its schedule, not Mr. Griess and not his superiors.

MR. LINCENBERG: May I add? Your Honor, I'm Gary Lincenberg. I'm Mr. Bird's partner.

Your Honor, I would suggest that the court proceed as follows. The court is facing two motions, a bill of particulars motion and a severance motion and they bear on the trial date.

THE COURT: Actually there's three.

MR. LINCENBERG: The waiver of speedy trial --

THE COURT: Yes, they want me to determine what is excludable time.

MR. LINCENBERG: Right, the excludable time issue, which, I'm sorry, we didn't oppose it.

THE COURT: Yes.

MR. LINCENBERG: The court, on the other hand, is faced with a general statement from the government that they're not even saying national security concerns, but that's what we're all thinking in our mind, that there's some national security issue that forbids them from saying why the court can't hear a bill of particulars motion and a severance motion, and I don't think that general statement should be enough.

Motions were filed on a schedule weeks ago. They were responded to. The court has a record before the court. If in ten days Mr. Griess comes in with new information, he can move for reconsideration. That's the normal course that a court would follow, if there's new facts that present itself that should change the court's view of that. But we have, you know, pretty defined issues here, and it was the government that chose to bring these charges in the middle of what presumably is against the background of a national security matter. They knew what they were doing. They knew that a defendant also has rights and that the speedy trial rights are paramount rights for a client.

With all due respect, we believe we represent an entirely innocent client who is separated from her family for a long period of time, and we're looking to push our matter to trial.

THE COURT: Okay.

MR. LINCENBERG: And we believe that the court should go forward, decide these motions and then, if there's something, that Mr. Griess can seek reconsideration.

THE COURT: Mr. Weinhardt, do you want to make some record here?

MR. WEINHARDT: Yes, Your Honor. First I think the record should reflect who all is here for the government. Mr. Griess, Mr. Krickbaum, Mr. Kahl and Mr. Klinefeldt himself are all present. No one is here from Washington, D.C. No one is here that I can tell from outside of this United States Attorney's office.

Also for the record Mr. Beck, our co-counsel from California, did travel here for this hearing for our client.

The reason why I want to put that on the record is I feel like all of these attorneys from this U.S. Attorney's office are being shoehorned into a position by somebody who isn't here to say to this court why it is that they want this continuance, and so I want to be clear that I'm not taking any of these four lawyers to task for the position that I think they have been put in this morning; but nonetheless we had a discovery conference on Thursday in which Mr. Beck and I and one other individual from our side were face-to-face with Jason, and Mr. Bird and one of his partners were participating by telephone.

We've written a couple of pretty extensive discovery letters because both sides will agree that it's very complex, there's a lot to work through. We spent at least an hour talking to each other, and at that time Jason indicated that there were developments in the nature of additional disclosures that he thought might change the landscape or the analysis on our sides about this severance issue; but since then there hasn't been any additional communication, I mean, not even at 9 o'clock last night to tell us, we don't have these things and they do change the landscape and so we want to put the hearing over.

Our view is exactly what Mr. Lincenberg expressed, which is, you know, when the government says we can't address these motions, it has. It's resisted them in writing. It's stated its position. We believe oral argument will be useful to the court in helping resolve them, and if then additional facts are disclosed to us by the government after the court has heard this that changes the landscape, either in terms of the relief that our respective defendants want or in terms of why the government thinks that it's not entitled to that relief, the parties can inform the court; but I don't see a reason not to go forward and have the oral argument on the papers that the government has already filed.

THE COURT: Mr. Griess, what's wrong with, even if you don't argue or Mr. Krickbaum for your side, that as long as they're here, what harm can come by them making their legal arguments and then they can go home?

MR. GRIESS: Your Honor, could I have just five minutes to confer?

THE COURT: Yes, sure.

(The government attorneys left chambers.)

(Pause.)

(The government attorneys entered chambers.)

MR. GRIESS: I apologize for the delay, Your Honor.

This is obviously not a typical case.

THE COURT: Yes.

MR. GRIESS: It's very different. We are proposing two options to the court today. We're sensitive to the idea that counsel has traveled here today. I was sensitive last week when we discussed it. I'm limited in what I can say about it and, unfortunately, that's the position I've been in for --

THE COURT: Mr. Griess, let me interrupt. Did counsel -- I mean, we're all here speculating and assuming that this is somehow related, because I read the papers about FISA warrants. Is that what we're talking about? I mean, I don't see what the problem is putting that out here. I can seal this transcript. If that's it, why don't you just tell us.

MR. GRIESS: Judge, I wish I could and I can't. I've been directed specifically in that regard, and I am extremely sensitive to my obligations both legally and ethically and, unfortunately, I've been directed not to say anything about that.

THE COURT: Okay. I interrupted you.

Go ahead.

MR. GRIESS: I apologize.

THE COURT: Yes.

MR. GRIESS: The options that we would suggest are the first being that we go ahead and have oral arguments on the motions today. If we go forward in that regard, the government would stand silent for those motions and, in fact, would move to withdraw our briefs at this point in time. We would ask the court not to rule today, however, and give us a chance to respond when we're able to. We believe that -- although we have no guarantees, but we believe ten days would put us in a position to do so.

The other option would be the first one I proposed, that we continue this until we are able to fully respond. The problem with the court hearing motions and then ruling today -- and we believe that would be the biggest waste of time because we believe and know that there's information that is forthcoming that everybody is going to want to know and need to know, including the defense and the court. It puts us in a position of having to go back and retread ground that we've already covered.

So we would suggest either of those first two options is the best way of proceeding this morning, again with apologies and sensitivities to being in a situation we don't want to be in.

THE COURT: Well, in the information that we might learn, what kind of time frame are we talking about?

MR. GRIESS: Judge, we believe that ten days gives us -- puts us in a position to be able to do that.

THE COURT: Okay. We're going to go ahead with the hearing this morning, and you can make whatever record you want, make whatever requested relief you want in terms of sanctions. I think this is sound discretion of the trial court, and I'll try to exercise my discretion soundly.

Mr. Krickbaum, are you handling the motions for the government?

MR. KRICKBAUM: Judge, we're not going to be speaking about the motions. So if I'm handling that argument, it would be very briefly.

THE COURT: All right.

MR. LINCENBERG: But we need to know who's not going to speak first.

MR. KRICKBAUM: Very important.

THE COURT: Okay. But we'll proceed in open court unless there's some reason we can't proceed in open court. I think the presumption is that we have an open court system and things are supposed to be public except when they can't be.

Mr. Bird, I might ask you and Mr. Beck, you're both in the Ninth Circuit, I know from talking with judges, district judges, there have been FISA -- I'm speaking of Judge Fisher and Judge White on the district court in the Northern District. Judge Fisher on the Ninth Circuit, I know a little bit about.

Do you have familiarity with FISA implications or --

MR. BIRD: We do generally, Your Honor, yes.

THE COURT: Okay.

MR. BECK: And, Your Honor --

THE COURT: Yes.

MR. BECK: -- John Cline, who practices in San Francisco and devotes his practice to FISA, has joined us as co-counsel. He will become counsel of record as appropriate, but he's here today to answer any procedural questions.

THE COURT: Okay. Well, I'm just speculating about what our problem is, but I don't want you to come here and not make your argument, particularly when you told my chambers that it was essential for your client. So we're going to go ahead with our submission today.

MR. BIRD: Thank you, Your Honor.

THE COURT: All right.

MR. BIRD: Could we just have five minutes outside?

THE COURT: You sure can.

MR. BIRD: Thank you, Your Honor.

(Recess at 10:25 a.m., until 10:30 a.m.)

THE COURT: Be seated.

THE CLERK: Your Honor, the case before the court this morning is 4:13-CR-147, the United States of America versus Mo Yun and Mo Hailong.

Counsel, please enter your appearances for the record.

MR. BIRD: Good morning, Your Honor. Terry Bird representing the defendant Mo Yun who is present in the courtroom.

MR. LINCENBERG: Along with Gary Lincenberg and Leon Spies.

THE COURT: All right. Good morning.

MR. WEINHARDT: Your Honor, Mark Weinhardt and Holly Logan from Weinhardt & Logan and Mark Beck from the Mark Beck Law Firm for the defendant Mo Hailong --

THE COURT: All right.

MR. WEINHARDT: -- who is present.

MR. GRIESS: Your Honor, Jason Griess representing the United States.

MR. KRICKBAUM: And Marc Krickbaum on behalf of the United States.

THE COURT: Good morning.

Mr. Bird, two of the motions are yours, so if you want to proceed, you may do so.

MR. BIRD: Thank you, Your Honor.

I will be addressing the severance motion, Your Honor. Mr. Lincenberg will address the bill of particulars.

Your Honor, since the outset of this case, it has been our perception that the government has indulged in what I call a shoot first and ask questions later approach. Our client was visiting in Los Angeles in late June and then was arrested at

LAX on her way back to China. Prior to that time there had been no mention of my client in any of the previous indictment that was returned in December of 2013 against her brother. There had been no mention of her in the preceding complaints. It wasn't until her indictment on July 2nd that six separate excerpts, cut and paste excerpts as described by Special Agent Betten, first surfaced and we learned that the government would charge our client.

Since that time there has been no additional evidence forthcoming. Those excerpts, contrary to the description provided by the government in its briefs, do not involve any discussion by her of the theft of trade secrets. There is nothing in those six excerpts, cut and paste excerpts, which discuss the theft of trade secrets; but on the basis of a retroactive interpretation of those benign statements, the government argues that she is a co-conspirator.

You will recall at the bail hearing that we had on July 17th that Agent Betten acknowledged, as he had to, that the charges, the excerpts, the cut and paste excerpts, that were the -- that embodied the entirety of the allegations against our client, direct allegations against our client were, in fact, interpreted in light of actions in 2011 and 2012.

I should have mentioned that the original indictment that was returned in December of 2013 not only does not mention Mo Yun, but the indictment as it was alleged in December of 2013 describes the conspiracy as having taken place essentially in 2011 and 2012. There was no mention of earlier activity or discussions.

So our position generally is that the government has distorted -- and I would go through two or three of these cut and paste excerpts to describe for you in particular, in fact, where Mr. Krickbaum talks about our client being in charge or instructing --

THE COURT: Yes, I was reading Mr. Krickbaum's submissions, his document 105 at page 6, and I didn't see in your response any answer to -- the way I understood Mr. Krickbaum's submission was -- and this is my characterization, not his -- that it appeared that she was directing the conspiracy.

MR. BIRD: Right. And what they do is in paragraphs 28 and 29, they talk -- they use the word "instructed," but when the court will actually look at the cut and paste excerpts, even assuming that those are authenticated, even assuming that that's my client and that these excerpts are trustworthy and will be admitted in evidence, you can see, Your Honor, that they've distorted the language in those paragraphs -- in the actual cut and paste excerpts.

If we look, for instance, at the actual excerpts, the actual reading is you can send, you can send -- let me get it. Just a moment, Your Honor. "You can send to Dr. Lei." It doesn't say you must send or I'm instructing you to send. "You can send." And if you read the actual excerpts, you'll see that this person that they've identified as my client is very -- lacks all knowledge about the corn seeds, misstates -- doesn't understand that some corn is for animal feed and some corn is for human consumption, and clearly they discuss securing these seeds, the people who are alleged to be my client and the defendant Mo Hailong, in the context that we discussed July 17th of publicly available information, the Burpee web site and the U.S. Department of Agriculture web site, and yet what they've done is take 2011, 2012 surveillance and allegations and interpreted these six cut and paste excerpts in the way that serves their purposes. That's the context in which we've asked for the court to sever these defendants.

Now, let me address some of the law involved in the court's decision because I think the government has turned the Zafiro case on its head. That opinion written by Justice Sandra Day O'Connor clearly stands for the proposition that there are no bright line rules which should be applied in the context of a severance motion. In fact, the defense in that case, according to Justice O'Connor, asked for a bright line rule to be constructed and the Supreme Court rejected that proposition. And, in fact, what Justice O'Connor ultimately said is that the risk of prejudice, which is part of the issue under rule 14, will vary with the facts in each case, and district courts may find prejudice in situations not discussed here.

Now, what the government has done in its brief, has suggested that there is, believe it or not, a bright line rule that we have to show that the defenses must be irreconcilable or that the jury will be unable to compartmentalize the evidence. And what I'm suggesting respectfully, Your Honor, is that misunderstands and turns Zafiro and the Eighth Circuit law on the question of severance on its head.

THE COURT: Mr. Bird, let me interrupt. My law clerk just handed me a note telling me we haven't sworn the interpreter.

MR. BIRD: Oh, sorry, Your Honor.

THE LAW CLERK: Mr. Interpreter, would you stand and raise your right hand.

(The interpreter, Chau Lau, was sworn by the clerk.)

THE COURT: Mr. Bird, I apologize. You were talking about Justice O'Connor in Zafiro and the bright line rule that the government -- you say the government now seeks to impose?

MR. BIRD: Right. The point is simply this, Your Honor. What the government wants to say is that we haven't fit into these neat little cabinets, these little notches. We haven't proved this, we didn't prove this, we have to prove that, we didn't prove that. And what I'm suggesting to the court is that's not the way this works. Rule 14 talks about prejudice. If the court finds that there's prejudice, then the court can sever this case, and we urge the court respectfully to do that because we think there's real prejudice here.

Now, I would also note when they talk about cases, the Eighth Circuit cases, like Sandstrom, Hively, Mickelson, Kime, these are all cases, all cases where there were -- there was live testimony. There was an abundance of evidence, and what the Eighth Circuit did, contrary to the situation that we have here in this district court, was to consider whether or not there was an abuse of discretion, and all the Eighth Circuit said in those cases is because there's overwhelming evidence essentially as to both defendants in that case, that severance was not an abuse of discretion. That doesn't change the fact in any way that this court has inherent discretion to decide whether there is sufficient prejudice to sever these two defendants.

THE COURT: Mr. Bird, here is what I want to talk about. Kime tells me this. "Rarely, if ever, will it be improper for co-conspirators to be tried together. What is required is an affirmative demonstration that the joinder prejudiced the movant's right to a fair trial. Mere disparity of evidence against codefendants or the alleged prejudicial spillover effect of evidence against a codefendant are not grounds for severance absent a showing that the jury will be unable to compartmentalize the evidence against each individual defendant."

Now, going from Kime to Sandstrom that we just mentioned, "Prejudice must be real and more than speculative," and I've never figured out what discretion is beyond being when you try and define it, you don't do --

MR. BIRD: You'll know it when you see it.

THE COURT: So if mere disparity is not the answer -- and, you know, I tried to find in some of these cases where a district court and the Court of Appeals had, in fact, granted a severance. Almost all of the law on all of these cases affirmed the district court's discretion. So, I guess, where is the real prejudice here that is more than speculative?

MR. BIRD: All right. Let's talk about that. First of all, there are cases, even a recent case, Nyuon, N-Y-U-O-N, I believe it is, a district court case out of the Northern District of Iowa -- and I can give the court the cite on that; I don't think it's in our briefs -- talks about the fact that the Sixth Amendment right to a speedy trial as established in the Klopfer case in the Supreme Court, 386 U.S. 213, is a fundamental right, is as fundamental as any of the rights secured by the Sixth Amendment. That proposition has been adopted by the Eighth Circuit to talk about the type of prejudice that exists here. Our client, if the government has its way and if severance isn't granted, will be tried sometime next year. We don't know when. And I think you're going to hear from my colleagues on the defense side that they don't believe they're going to be ready to go to trial until as late as next fall --

THE COURT: Well, this gets me to the government's motion, which my understanding is going to be withdrawn, but my understanding is if that's true and the joinder remains, your client is tied to the other defendant's Mr. Hailong's speedy trial clock.

MR. BIRD: Yes.

THE COURT: Is that the wrong --

MR. BIRD: We accept that, and we actually filed a note in opposition to the government's motion. We understand that because we thought we were going to have -- we're arguing for a December 1st trial, but we're not giving up our rights to a speedy trial. And we take issue with the government's brief that suggests that all of this is subsumed by the Speedy Trial Act and that a severance is part of that. As the district court said in the Nyuon case, where you've got a situation where simultaneous -- or a common trial between co-defendants requires the confinement of a defendant for an unreasonable period of time, severance is appropriate.

And, you know, I think that my colleague is going to talk to you more about the Barker versus Wingo, 407 U.S. 514, and Stockman and the Titlbach case from the Eighth Circuit that make it clear that the Eighth Circuit courts will grant severance when they believe that there is an unreasonable period of time in which the defendant is going to be confined because of the speedy trial rights, and we think that's what is going to happen in this case, Your Honor. That's why we want to get to trial in December. So there is real prejudice in this case.

Now, let's address the spillover question that Your Honor raised. We think that there is spillover for some of the reasons I've already addressed. Is the evidence different? Yes, it is. Six excerpts, and Your Honor has -- we've gone through some of those on July 17, and I've addressed a couple of them quickly here. I'm prepared to go through all of them if the court wants to, but I ask you to compare the excerpts with the government's version of that.

The evidence that the government alleges in its indictment does not involve any, any recording of an intention or act to steal a trade secret as opposed to securing seeds. And what the government has done is to take actions two to three years after my client was no longer -- and they admit this, because they say she left the company in March of 2009. The evidence will ultimately show that she actually left the company in the fall of 2008 when she was pregnant with her second child.

So there's a two- or three-year gap between the allegations that they filed, the six cut and paste excerpts, and the operative allegations that were filed in the first indictment in 2011 and 2012. And there's nothing, not one allegation about any activity that my client was involved in in

2011 or 2012. And on that basis they seek to apply Pinkerton. Pinkerton was an ongoing mail fraud conspiracy. We're all familiar with Pinkerton. That's factually completely different from this case. There was no gap in Pinkerton. There was no two- or three-year hiatus, and we ultimately will argue to the court during our motions in limine that, in fact, that gap constitutes a severance, if you will, of the alleged conspiracy and a withdrawal, effectively a withdrawal, even if one assumes that the government's allegation is accurate that she was -- that our client was involved in a conspiracy in the first place, which we don't think they can establish and we don't think independent evidence will establish.

So there is spillover because our client will be required to answer to the jury questions about what happened in 2011, 2012, more importantly, what happened in 2007, 2008, based on the government's stretch, distorted rendition of what those words, the word "instructed" in paragraphs 28 and 29 where they take her word, you can do this, and they call that an instruction and, therefore, she automatically becomes one of the leaders of this conspiracy.

You know, if the government has its way, Your Honor, they can allege anything they want and they can say, well, it's up to the jury, it goes to the weight of the evidence; but that ought not to be the way it works. There has to be some rational basis for their allegation. And in this instance the court can look at the face of the indictment and it can look at the excerpts and say there is no rational basis for that or at a minimum, as the court has already done, can say that's very thin evidence. And because of that thin evidence as compared to our co-defendant who allegedly they say did a number of things in 2011 and 2012, there is going to be spillover.

There's no way that a jury, even with a carefully crafted jury instruction, is going to be able to distinguish the brother of her co-defendant, the wife as they've alleged in black and white, the wife of the chairman of this company, who is Chinese, who's living -- who lives thousands of miles away, is somehow separate and different from when the government takes that kind of language and distorts it and says, "You can do this" and make that an instruction that that's what she's supposed to do.

THE COURT: Okay. Mr. Bird, I'm going to take your argument. This is from the last part of Sandstrom. "A defendant can show real prejudice either" -- and this is either, so there's two ways -- "by showing that his defense is irreconcilable with the defense of his codefendant...or that the jury will be unable to compartmentalize the evidence as it relates to separate defendants."

I think you're claiming both, aren't you?

MR. BIRD: We're saying that there's -- yes, we're claiming both of those.

THE COURT: All right.

MR. BIRD: But we're also saying beyond that, Your Honor, that the court can look at other factors, that you have the inherent discretion, and, in fact, Sandra Day O'Connor, Justice O'Connor, made that clear. She said not only will it vary from case to case, but she pointed out two or three instances in which the court might find an exercise of discretion -- in its exercise of discretion that there ought to be a severance. She said by way of example when there's evidence that a jury should not consider against one defendant and would be excluded if the cases were severed. We have that here, Your Honor.

We're going to raise a Bruton argument. We're going to raise a Sixth Amendment argument as to those excerpts. We're not only going to argue that they can't be authenticated, but we're going to say that there's a Bruton problem here and that they ought not be introduced as those other -- those other alleged co-conspirator statements should not be introduced as to us.

A second example that Justice O'Connor used in the Zafiro case, she said when there are differing degrees of culpability for defendants. The government has acknowledged to this court that this is a unique case, this is a unique case, and one of the aspects of it that makes it so unique is the differing degree of alleged culpability for these defendants.

It's vast. The difference is enormous. There is not only a two- or three-year gap in the allegations, there's a great gap in the level of alleged culpability between these two, and that is going to be part of the spillover. And that's one of the things that Justice O'Connor pointed to in the Zafiro case that courts like this court should take into consideration.

Your Honor, I understand the circumstances under which these arguments are being made, and we will address, after the government has an opportunity to state its position, the effects of that; but I did want to advise the court, one of the things that the government said in its brief is that we hadn't filed certain motions yet. Of course, there are vast amounts of discovery which have not been made to us in this case. I think the court is aware of some of that already.

As my colleague, Mr. Weinhardt, has already made the court aware, long detailed letters seeking that discovery have been filed with the government, and it's in significant part because we haven't received that discovery that our motions haven't been filed. Let me make this clear. We're prepared to file motions concerning those co-conspirator statements, authenticity issues, the statements at LAX that the government seeks to rely on, and other issues very quickly. I'm prepared to address some of the admissibility arguments to the court today; but we're also prepared to file those motions.

So why is that important? Because as I noted to the court's clerk a few weeks ago, one of the things that we wanted to address personally to the court today was how -- when the court sets December 1st as the trial date in this matter, how we are going to get from here to there in a timely and effective and efficient way. And our position is that we respectfully ask the court to set hard and fast discovery dates with sanctions if those discovery dates are not met and hard and fast motion dates so that we can follow up on the discovery that is made with all of the motions in limine, with all of the suppression motions, with all of the motions that we would bring so that this court can consider these motions between now and December 1st.

THE COURT: Well, I don't want to argue for counsel for the opportunity to be here in December and January, Counsel.

MR. BIRD: Well, we understand that it's going to be a little bit different than it is right now, Your Honor, but we're prepared to survive that.

THE COURT: Okay.

MR. BIRD: So it's important, and we're prepared to address with the court in more length today, and by the court's inquiries, as to how we might go about structuring those hard and fast deadlines.

THE COURT: Mr. Bird, all of the lawyers here are very competent and capable, and I'm hopeful that we can come to some agreement with the government and you and the other defendant about discovery and get to the merits here because I think these -- you're mentioning the Sixth Amendment right of both defendants in Barker versus Wingo, and the government obviously has important interests here, too, but I know that you're all reasonable and that we'll get this done.

MR. BIRD: Thank you, Your Honor. I am confident of that as well, Your Honor.

One or two other points. I know that Mr. Weinhardt is going to address a couple of my points in more detail, so I'm not going to steal time from him on that, on those issues; but I did want to point specifically to some arguments that the government made as it relates to co-conspirator statements because we did not discuss some of this in our brief and I want to address it quickly here.

THE COURT: All right.

MR. BIRD: When you get into the question of the Sixth Amendment right under Bruton, and so forth, to confront witnesses against us, against our client, we're really talking in this context about whether or not the government has provided sufficient requisite independent evidence, evidence independent of the statements themselves.

Now, they've pointed to two or three categories of evidence that they believe provides the foundation for introducing co-conspirator statements, and when I refer to co-conspirator statements, I'm talking about a couple of things. I'm talking about, for instance, two of the six excerpts, the cut and paste excerpts, involve alleged conversations or communications between Li Shaoming and Mo Hailong. Our client wasn't involved in those conversations, isn't even allegedly identified as a participant in those communications, and there are statements made there which the government misconstrues, but nevertheless construes, as having -- as evidencing our role, alleged role in this conspiracy. We're saying that those excerpts alone and others similar to them where we weren't even a participant, if they would be introduced against our client would violate her Sixth Amendment right to confront witnesses against her because they're -- and the government says, well, these were co-conspirator statements, these were made in furtherance of the conspiracy.

That doesn't get them all the way to the end point of where they have to go to her. They've got to show under the Mickelson case and U.S. v. Kelly, also an Eighth Circuit case, and other cases like that that there is independent evidence, evidence that is independent from the co-conspirator statements themselves, and they can't do that here. They can't simply say, well, we've got all of this evidence and then use that to interpret words like "can" as an instruction later on. That's what we're saying is so deceptive, disingenuous for the government to try and bootstrap itself into independent evidence.

So we would ask the court to look at Mickelson again, and I know the court has already reviewed that, but look at the three tests that are laid out in Ragland, 989 F.2d 980 -- I'm sorry, Ragland is cited in the brief; but it's Kelly that is at 989 F.2d 980, that talks about the need for independent evidence, what independent evidence is. We don't believe that they can demonstrate through independent evidence that those types of statements, co-conspirator statements, whether they were made in 2007 or 2008 or in 2011 or 2012, especially in 2011, 2012, should be introduced against our client.

It's because of these type of issues that there is going to be tremendous spillover and there is going to be prejudice against our client, and that's why we should have, as Justice O'Connor suggested in the Zafiro case, that courts such as this one should consider not only level of culpability but this type of evidence that should not be introduced as to one defendant when it might be introduced as to another.

Your Honor, I will reserve the right to address the scheduling issues with the court after we've heard from the government and Mr. Weinhardt about these issues.

THE COURT: All right.

MR. BIRD: Unless the court has other questions, I'll submit it on this.

THE COURT: Thank you very much. I don't.

MR. WEINHARDT: Your Honor, on behalf of Mo Hailong, we filed a joinder in Mr. Bird's severance motion, and I wanted to speak to that just briefly.

We and the Mo Yun team find ourselves in radically different circumstances in terms of how to defend this case. While the funds of information faced by the Mo Yun team that is relevant to their case is large by the standards of the average case tried in this courtroom, it is relatively slight compared to the funds of information with which we have to deal. And I call it information, not evidence because I'm not going to concede that there is evidence inculpating either defendant; but the waterfront of information that we must process and understand is, in my practice, unprecedented. It's unprecedented first in terms of its volume in which we have had multiple terabytes of information produced to us. A terabyte, as I understand it, is sort of the equivalent of 17 or 18 hundred bankers boxes stuffed of fully printed material.

There is the issue of Mandarin translation in which much of the information that has been produced to us is only in Mandarin and we're able only to look at it through translation. And the national security aspect of this -- and our associate, Mr. Cline, can speak more to this in more detail if the court is curious, but when you get into the national security area, those translations become just crushing in terms of the obligation that they impose upon defense counsel.

And the other thing that is different about this is the delay in discovery produced in this case has been absolutely unprecedented. So we're nine months into the case on behalf of our client and discovery isn't done and we don't know when it's going to be done. I've never been in a position remotely like that.

THE COURT: Mr. Weinhardt, I read the transcript of Judge Bremer's April scheduling. I get the impression from that that discovery was going well. Was that incorrect?

MR. WEINHARDT: I don't believe that any of us in April anticipated that we would be standing here on October 1st awaiting further disclosures. I think it's just that simple.

THE COURT: Okay.

MR. WEINHARDT: And, yes, we were talking to each other and our discussions have been cooperative and cordial, and there's been no motion practice at this point. I think Mr. Beck is going to want to visit with the court a little more specifically about discovery, but just the idea that we're this deep this into the case and rule 16 is not complete is unprecedented in this court.

THE COURT: And as well, when I read the indictment and when I try to understand male and female and inbred, hybrid, can I assume that there will be expert testimony from both sides of this case?

MR. WEINHARDT: Yes. Yes, and it will be extensive. It will be like a civil technology trial in that aspect of it, and we anticipate that there's going to be a pretrial disclosure schedule of expert opinions that will have to be exchanged, and so forth, and that that's a period that will take quite a bit of time.

Now, Mo Yun has personal circumstances for why she wants a speedy trial and she has strategic circumstances why she does, and I won't speak for her. But our circumstance is that we are many months from being able to competently defend this case. I know in the joinder that we filed Ms. Logan was the one who signed the affidavit, but she and Mr. Beck and I collaborated in preparing that and issuing the opinion contained in it. Collectively, we have 80 years experience among the three of us defending federal criminal cases. We simply don't see how we can be prepared to try this case until deep into 2015, and that is an irreconcilable conflict with what I think Mo Yun's speedy trial and Sixth Amendment rights are.

What I want to talk about now is the legal basis for that because the government articulated the position in its brief that essentially speedy trial concerns are off limits as a basis for severance, and we will articulate a different one, which is the right to effective assistance of counsel because absent our ability to prepare properly, that is a trial right that will be compromised by the absence of severance if we are forced to go to trial on a faster schedule to accommodate the Mo Yun team's concerns.

The Zafiro opinion that Mr. Bird referenced is the polestar in this area, and this slight number of words is all the court needs to focus on. After its discussion of some of the other more conventional grounds of severance, the court says, "District courts may find prejudice in situations not discussed here." In other words, the Supreme Court is leaving the door open in Zafiro for any manner of prejudice to someone's trial rights that could appear based upon whatever the record is in that case. This is an unusual case and so it's got unusual but not, as I'll show, unprecedented grounds.

The government takes this snippet from the Sandstrom case and tries to make it as though in the Eighth Circuit, as opposed I suppose to other circuits, there are only two grounds that can ever be the basis for a rule 14 severance, either irreconcilable defenses or spillover. That simply is not the law. What I read in Zafiro makes it plain that that's not the law, but Sandstrom makes it plain that that's not the law. Sandstrom was not a case about whether or not there is some other grounds. Sandstrom was an irreconcilable defenses case, and so that statement in Sandstrom is dicta that says nothing about what the limits of severance jurisprudence are.

The government makes a clever but insufficient argument about the Speedy Trial Act and how it bears on whether or not you can obtain a severance based upon a speedy trial abuse. They cite a number of cases for the proposition that in calculating the speedy trial clock that whoever is the last added defendant, that person's clock is the one that everybody else's clock gets reset to.

The problem with that analysis is that in four of the six cases that they cite for that proposition, there was no severance issue whatsoever. Severance was never even an issue in the case. In two of the cases, and those would be the Casas case from the First Circuit and the Varella case from the Eleventh Circuit, there was a request for a severance on the part of the defendant, and the severance was denied and the circuit courts affirmed but on a fact specific ground. In other words, they said no abuse of discretion denying a severance here.

If there were a rule based upon the Speedy Trial Act that says that timing considerations are not a basis for severance, then the courts in Casas and Varella would have denied the motions on those pure legal grounds rather than denying them on abuse of discretion grounds.

More importantly, the Monroe case from the Sixth Circuit cited by the government points exactly the opposite way. In that case the defendant complained of a speedy trial violation but did not move for severance, and the Sixth Circuit called him out for it and said, well, Monroe at no time moved to sever his trial from Calmese. In other words, the Sixth Circuit is saying he didn't do the thing he needed to do if he wanted to avoid a delay or an untorrid delay in his trial based upon what happened with the defendant -- or with the co-defendant.

So really I think the law points in the direction of saying that this is a proper ground for a severance, and really all the courts we'll find in the cases that the government cites is that the Speedy Trial Act is set up in a way that is in a sense nondiscretionary, and Congress and the courts don't want a nondiscretionary, relatively binary determination under this statute to overwhelm the court's discretion in its ability to grant a severance under rule 14.

What the court will find is, if it looks around at other cases, is that there are situations both on the Yun side where someone wants to go to trial in a hurry and on our side where someone needs more preparation where severances have been confirmed.

And if I may approach, I have a couple of cases that I want to hand up to the court that weren't cited. The first --

THE COURT: Just hand it to her.

MR. WEINHARDT: The first, Your Honor, is a case that Mr. Bird made reference to, the Nyuon case. That actually wasn't the Northern District of Iowa. That was the District of South Dakota with Judge Schreier who specifically granted a severance on the basis of a defendant's speedy trial concerns. In the Nyuon case -- and for record purposes, it's 2013 Westlaw 943635. In that case her concern was a constitutional speedy trial problem under the Sixth Circuit jurisprudence under Barker versus Wingo. But in a different case that I've also handed to the court, United States versus Stockman, Judge Schreier did it where she expressly does not find a constitutional problem, but nonetheless finds a discretionary basis in that case, because one of the co-defendants was ill, to grant a rule 14 severance. Stockman is at 2010 Westlaw 959928.

Surely, if it were -- and there's one other case cited in Nyuon where the District Court in South Dakota did this, in a third instance. Surely, the courts up there would not be doing this if it were simply out of bounds for the Eighth Circuit to grant that relief.

On the flipside, I would like to call the attention of the court to United States versus Ailsworth, A-I-L-S-W-O-R-T-H. It is a district court opinion from the District of Kansas at 873 F. Supp. 1450. That was a situation in which there was a multiple defendant case. One of the defendants lost his lawyer and a new lawyer comes in for that defendant. It was a complex case, and so the new lawyer says, "I need more time to prepare, and so I need to sever my case from the other defendants."

And Judge Crow, exercising his discretion, granted it. Here is what he said. He could be talking about our case. "Based upon the volume and complexity of this case, it would be difficult or impossible for Rice's counsel to adequately prepare for trial. Although the government correctly notes that this severance will require it to basically present the same evidence in two separate trials" --

THE COURT: Mr. Weinhardt, a little slower for the reporter.

MR. WEINHARDT: I'm sorry. My old high school and college debate instincts take over.

THE COURT: That's all right.

MR. WEINHARDT: -- "the court believes that the unique circumstances of this case warrants Rice's severance from the other co-defendants. The court finds that the general preference for trying coconspirators in a single trial is outweighed by other, more compelling considerations."

And what the court will also find as it goes deeper into the material that I've highlighted in the Ailsworth case is one of the considerations was that the government, while not acting in bad faith, was nonetheless dilatory in making discovery disclosures just like is happening here.

And so we believe that independent of the Speedy Trial Act concern, we have a constitutional dimension for why we're entitled to a trial on a much more deliberate pace so we have adequate time to prepare.

The one other thing that I -- oh, the court has a question?

THE COURT: Yes, excuse me, Mr. Weinhardt. Mr. Krickbaum's brief, here is the way I get severance and its relationship to the speedy trial, at least the government's argument. "This is no quirk of severance doctrine: The preference" -- he's talking about excludable time. "This is no quirk of severance doctrine: The preference for joint trials is built into the Speedy Trial Act itself. The Act provides that a district court must exclude time under the Act for 'a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.'"

So I don't think the government is saying I can't sever. I think what their argument is, as I understand it, is if you don't sever, the speedy trial clocks of both defendants are synchronized. Is that --

MR. WEINHARDT: I agree in the absence of a severance that they are synchronized, and we have not resisted their motion about excludable time.

THE COURT: Okay.

MR. WEINHARDT: In fact, we've expressly filed a statement of nonresistance. So we're not contending that there's a speedy trial violation. We're contending that due to the unique circumstances of this case, Mo Yun I think very likely has a strong Sixth Amendment argument for needing a speedy trial. We have a strong Sixth Amendment right for effective representation of our client for a slower trial. And what I'm saying is the Speedy Trial Act does not preclude this court's ability to exercise its discretion to sever in recognition of those competing interests.

THE COURT: You're just telling me that the Speedy Trial Act and her Sixth Amendment right go into the exercise of discretion in addition to the factors that Mr. Bird pointed out?

MR. WEINHARDT: That's exactly right. So for Mo Yun, that's one of the additional factors that weighs for a severance. For us, our need to effectively prepare is a reason why we shouldn't be dragged into an earlier trial date with her.

THE COURT: Okay.

MR. WEINHARDT: One other thing that I want to say for record purposes is because we understand that more discovery is coming, I want to make it clear that this is Mo Yun's motion for severance, it is not ours, and we reserve the right to file one of our own on other grounds, antagonistic defenses spillover, we may want to call her as a witness, you know, any of the recognized grounds in Zafiro. We may want to have our own motion about that once we see the full breadth of discovery. We're just not there yet.

THE COURT: Okay.

MR. WEINHARDT: I think Mr. Beck would like to address discovery as it bears on this for just a moment.

THE COURT: That's fine.

MR. BECK: Your Honor.

THE COURT: Good morning.

MR. BECK: I know there is not a discovery motion or an issue directly bearing on discovery before the court, but the court has referenced discovery and there are certain assumptions here that we all had that may be incorrect with regard to how this case can proceed and what the dates are going to have to be. We subscribe, as the court suggested we ought to, I think every counsel in this case subscribes to the notion that discovery timetables need to be worked out between counsel. I think with gratitude we give thanks to Mr. Griess for the way that he has endeavored to work with us; but what we've seen today in chambers I think provides the explanation as to why the government has not been able to meet the various deadlines set by the magistrate for discovery.

We are nine months into this case and we don't have the complete rule 16 discovery. We've got 30 single spaced pages of discovery clarifications and demands out to the government that have yet been fulfilled. Now, there's no criticism of them per se, but without deadlines set by this court that will send a message to Washington, D.C. that this case and the deadlines set by this court are going to have to determine how this case goes --

THE COURT: Mr. Beck, could you do this for me --

MR. BECK: Sure.

THE COURT: -- and I don't know if you want to confer with Mr. Bird and Mr. Griess before you do this; but as experienced and capable lawyers that I have, it seems to me that you know the evidence much better than I. I would like to set a schedule, but I would only do so on the advice of counsel. I mean, have you suggested to the government, here is the deadlines we want to work with and -- because I think you know much -- I'm repeating myself. You know much more about it, the government knows more about it than I do; but can't we just agree on some dates?

MR. BECK: Delighted to.

THE COURT: Okay.

MR. BECK: What I'm hoping to leave the court with is a sense from the court that deadlines may be set by this court as suggested by counsel and as agreed by counsel that will be the deadlines in the case.

THE COURT: Because when I -- let me -- when I read Judge Bremer's conference with you, or maybe it was Mr. Weinhardt and the government, I had the sense, you know, you were -- this was back in April. You were talking about June and you were talking about a placeholder. Now, I called her yesterday and I said, you know, it looked to me like you're talking about 2015 even back in April, and that's before we have the arrest and the superseding indictment, so --

MR. BECK: All true, except 2015 now is the fall of 2015, and if the dates slip further beyond the best intentions of the attorneys in this room, we're looking at moving it to the following year, nothing that anyone here wants and certainly our client doesn't want.

So with the court's permission, we will come up with some dates, propose those dates and ask the court to ensure that that message is heard loud and clear by, say, Washington, D.C. as well.

THE COURT: Thank you.

MR. LINCENBERG: Your Honor, again, my name is Gary Lincenberg.

One brief point in follow-up to Mr. Beck's discussion with the court about discovery dates is, obviously, that needs to take into account our desire to have a speedy trial and our desire to get a motion schedule on board. We want to make sure that we have the discovery before we start filing motions in limine that may be affected by future discovery.

Your Honor, just as in our view the court cannot afford the proper judicial respect for the speedy trial rights of our client and afford our client the ability to have a fair trial in an expedited and efficient context without a severance, we also cannot be afforded the ability to fairly know what the charges are against us without a bill of particulars.

Now, Your Honor, with respect to any discussion of the bill of particulars, I think there are three starting points for the court.

The first is that the cases talk in terms of the court not just having discretion but, quote, broad discretion to grant a bill of particulars.

Second, the advisory committee to rule 7(f) -- and we cited this in our papers -- specifically stated that the court should take a liberal approach in granting a request for bill of particulars.

And the third starting point is the reason for the first two, and that is the interest of fairness, that somebody should know exactly what they're charged with before they have to defend themselves in a federal criminal case.

And here we have a complex case involving intellectual property and trade secrets, a case where the indictment alone spent a number of pages just talking about the background of germplasm --

THE COURT: Do you share Mr. Weinhardt's view about the complexity, that he hadn't had a case this complex? Is that -- you've been in this court for a long time. Is that your sense as well?

MR. LINCENBERG: Well, I think I've had a case more complex, but I think that it's sort of different for the two defendants because, from their point of view, there's allegations of individuals going into fields and taking seeds.

THE COURT: Right.

MR. LINCENBERG: And the defense, obviously, will largely depend upon a very complex and detailed analysis of trade secret law and protections that were taken and whether these were, in fact, trade secrets --

THE COURT: But, I mean, aren't you bound -- I mean, this is a conspiracy that's alleged, a joint partnership in crime. So I would assume if it's complex as to him, it's equally complex as to you, or am I missing something?

MR. LINCENBERG: Well, it may, but it very well may not because, as the court is aware, the only allegations involving our client are alleged 2007 communications. As the court knows, those are four years before any evidence, according to the indictment, of any alleged theft or trespass onto a property. And our defense, obviously, will focus very much on the fact that whatever happened in 2011 has nothing to do with general conversation in 2007.

Remember that -- well, Your Honor, the court will see evidence in this case that in 2006, 2007, Hailong Mo was in the United States, he begins working for a subsidiary of DBN, and DBN is this company in China, and there's sort of a general goal of educating ourselves on the market, on the partners to partner in business and the like. That's the general context of what's happening in 2007, and there's a discussion about obtaining seeds and studying seeds and understanding what the market is and where does the business want to go.

Fast forward four years, our client is long gone from the company, 2011, and you see allegations of trespass onto farms. And we may not need to defend against any of that, for a number of reasons. First, we have motions in limine that address a lot of that and what evidence will be admissible or not admissible that we're going to be presenting; but, second, while it's true that the government still needs to -- that there may be some overlapping evidence, and we still may want to have as part of our defense dealing with whether or not there was even any trade secret at issue in 2011 or 2012, we believe it's far more in our client's interest to be able to go to trial on the evidence and address it and do it in an expedited manner.

THE COURT: Okay.

MR. LINCENBERG: And we recognize -- go ahead.

THE COURT: No, I didn't want to -- I interrupted you before, Mr. Lincenberg. You were talking about the broad discretion allowed the trial court when I think I interrupted you, so I want to get back to the bill of particulars at some point if we can.

MR. LINCENBERG: Okay. So with regard to the bill of particulars, those are the three starting points and the background against which the court should make its ruling. Now, in that context, one thing the government says is, you know, all we've charged is a conspiracy and we don't even have to prove that there was a theft of a trade secret. Well, that may be the case. We'll deal with jury instructions and the like at a later date; but at the same time, in our conversation with Mr. Griess, we said, well, do you intend to introduce evidence that there was a theft of a trade secret? Because in the mountains of discovery that we have received, there's no evidence of that. There's evidence of trespass, perhaps. There's evidence of somebody taking seed, but not that those seeds were protected trade secret. And he said, yes, we do intend to introduce evidence in that regard.

Well, if the government intends to introduce evidence, it cannot have it both ways. It cannot say it is relevant, Your Honor, for us to be able to introduce this even though we don't need to introduce it and at the same time not tell the defense what it is that is being charged. If you look at the indictment broadly, the government said, boy, we have a lot of stuff in this indictment, talking about steps that can be taken to protect trade secrets and the like; but the indictment itself proves why you need a bill of particulars here because it has contradictory steps taken by the companies in different cases.

For example, if you look at paragraph 23 of the indictment, paragraph 23(e) says one of the things that we, Monsanto, or Pioneer sometimes do to protect our property is we engage in contracts with contract growers. Well, we have no idea if they're alleging that any seeds were taken from a property of a contract grower and, if so, whether those were seeds that the company even claims are subject to trade secret protection because, obviously, if the seed that's in the contract grower's field is the same seed that he bought at a store that somebody from DBN bought at a store, I don't think that Monsanto or Pioneer are going to even claim that those are subject to protection.

Take a look at paragraph 23 -- well, 23(h) is where they talk about this use of technology.

23(i) says, "Use of patents and 'plant variety protection act' applications are obtained for proprietary seed products."

Well, Your Honor, in this field, if these were patented products, I would submit that they are not subject to trade secret protection; they're subject to the protection of patent laws perhaps and the PVPA, but not trade secret protection. But the government won't tell us what they're alleging. They have about 15 paragraphs where they say people went into fields, and they don't indicate whether those were patented seeds or simply a bunch of overt acts thrown in as part of a story which doesn't give the defense an idea of what it is that the government is claiming is criminal or not criminal.

Another interesting paragraph here is 23(g). 23(g) says, "At particularly sensitive field locations, fields are monitored." Well, here the government appears to distinguish between sensitive fields where the companies such as Pioneer perhaps are going to extensive steps perhaps to protect trade secret seeds and methods, but they don't indicate whether they are alleging that any of the fields fall into this 23(g) paragraph that are sensitive fields that were monitored and the like.

And you would certainly think that in the course of just at least the past three years of investigation, this is something that would have been covered extensively with Monsanto and Pioneer and LG. We know from the discovery that we've received that there have been extensive meetings and interviews with folks at those companies, yet we see no evidence of that.

Now, I'm not here talking about discovery. That's a completely separate issue. I'm talking about bill of particulars, and in a bill of particulars, the defense being in a position to avoid undue surprise, to be able to prepare our defense, not against, for example, some of these other paragraphs in the indictment, which the government may in the end say are irrelevant because it's only perhaps 23(g) that is at issue here, but in a complex trade secret case, we need to be able to prepare and know what the charge is.

Now, in all of the cases that have been included in our papers, there's three that were trade secret cases in particular involving a bill of particular issue. And I think those three are really helpful for the court because two of them, the Groves case and the Latimore case were cases where the bill of particulars was denied, and lets look at why. If you take the Latimore case, which was an Eastern District of Michigan case, there were documents contained in a cost and supplier strategies -- excuse me, one moment.

Sorry. The case involved cost and supplier strategies, pretty straightforward trade secret stuff, and the courts there said the charge gives notice of that, the government has specifically pointed out that this is what's at issue, not that complicated, you don't need a bill of particulars.

If you look at the Groves case, which was a theft of documents, and, again, the court had there denied the bill of particulars because those documents had been clearly identified. There was a 245-page list of the particular files and names that were involved, and so forth.

Here, on the other hand, I would suggest that the case that gets closer to our case is the Liew case, L-I-E-W, because Liew was the case, the recent case in the Northern District of California where a bill of particulars was granted as to some counts and denied as to other counts, and the court went through a careful analysis of the issue, and they said, you're talking about the theft of a DuPont chemical product, which has all sorts of proprietary and nonproprietary information in it, in terms of how you make this product and the like, and the defense needs to be able to know what it is you're claiming was trade secret protected here. And, moreover, the court said, you also need to tell the defense your theory here of the trade secret violation. And so the court granted, in order to minimize surprise at trial and assist in the expeditious and efficient resolution of the matter, the court granted a bill of particulars on Counts 3 and 5 in that case.

That's what this court's job is here today, how do I as a court, Your Honor as a court, make sure that this trial proceeds efficiently and fairly.

We have a complex issue. We're talking about seeds in which Monsanto and Pioneer are saying that there's certain traits in there and we arrived at them in a certain manner, and so forth, and we have different steps in which we develop different types of seeds, and some of them are on the market, some of them are at different stages, some of them are still in the lab. And we need to know what is actually being alleged here, unless the government wants to take a step back and say, we don't plan to introduce evidence of any of this, we're just going to say there was a conspiracy to generally steal trade secrets and not get into any of the alleged trespasses onto property.

Your Honor, I would also suggest that a bill of particulars is even more important here as to our client because of what the government stated in the papers, which is that they are going to proceed on a Pinkerton theory against our client claiming that the acts of trade secret theft, which they allege in 2011 and 2012, were foreseeable to somebody back in 2007 in China who was having some general communications with her brother. And if that's where they're going with this, then we need to get into and say, all right, what exactly is it that you claim was foreseeable, that you're alleging was foreseeable to our client.

So, Your Honor, I would ask that the court should view this as something where the defense is simply trying to understand the specifics of a complex area, the specifics of what is being charged. This should not be something where the government plays hide the ball. If there's something that they claim was theft of a trade secret, they should have known it a long time ago. It should have been disclosed in discovery. Most importantly, for purposes of this motion, it should be identified in the bill of particulars.

THE COURT: All right.

MR. LINCENBERG: Thank you.

THE COURT: Thank you very much.

MR. BECK: Your Honor, may I just add briefly to that?

THE COURT: You may.

MR. BECK: At the beginning of the case, we had prepared a bill of particulars and in agreement with the government we decided to wait until we got discovery. Discovery has come in significantly, but not all, and we've found, at least it's our conclusion that we haven't found a trade secret. Almost all of the seeds at issue were purchased. Now, some may have been found in the ground, but those were likely patented, in which case they're in the public domain.

So if the government's position is this is a conspiracy to steal trade secrets, but they can get around a way to finding trade secrets, let's hear it. If that's not their theory, if there are trade secrets, please tell us. Their burden in responding to this would be very slight. Our burden in going through millions of pages and trying to figure out what they have, what we're defending is great. We would request that the court consider granting this.

THE COURT: All right. Thank you.

Mr. Griess, I know the record you made in chambers. Is there some additional record you need to make here, or do you want to stand on what you said in chambers or, Mr. Krickbaum?

MR. GRIESS: Your Honor, I would just reiterate briefly that as we informed the court, in lieu of the motion to continue, which, obviously, the court did not grant, we would ask the court to reserve ruling on this matter, give us an opportunity to be in a position where we can legally and ethically respond in a complete way, which we believe certainly the court is going to be helped and assisted, and counsel as well, with the information ultimately we believe we'll be able to respond with.

In addition, there's been some other cases cited today. We would also like the opportunity to take a look at those and be able to respond in that way.

So at this time we're going to stand silent with regard to the pending motions. We do not withdraw the motion, our motion with regard to speedy trial that was filed. We do withdraw or would ask for permission to withdraw our responses to the motion pending our ability to respond more fully.

THE COURT: All right. Mr. Bird and Mr. Beck, let me ask you, are you in agreement with what I assume is the government's position that speedy trial is properly waived as to both defendants until December 1st?

MR. BIRD: Yes, Your Honor.

MR. BECK: Yes, Your Honor.

THE COURT: All right. We'll consider the matter submitted.

We'll be in recess.

(Proceedings concluded at 11:40 a.m.)

C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated.

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to computer transcription under my direction and supervision, and that the foregoing computer transcription pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 5th day of October, 2014.

/s/ Terri L. Martin
CERTIFIED SHORTHAND REPORTER